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No. A-670

Supreme Court of the United States

APRIL TERM, 1985

HAROLD A. BEDAT, et. als.
Petitioners

vs.

McLEAN TRUCKING COMPANY, et. als.
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether it violates the Due Process clause of the Fifth Amendment of the U.S. Constitution to terminate a pending case by the retroactive application of a newly adopted statute of limitations where the action was timely under existing law at the time it was instituted?

2. Whether DelCostello is to be applied retroactively to a § 301 hybrid action without an analysis of the factors of Chevron Oil Co. v. Huson?

3. If Chevron Oil Co. v. Huson is applicable, whether this case requires an exception to the retroactive application of DelCostello?

OPINION BELOW

The opinion of the Court of Appeals for the Second Circuit appears in the Appendix hereto. The opinion is unreported and unpublished. Judgment was entered on December 14, 1984.

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Second Circuit was entered on December 14, 1984.

This Court's jursidiction is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

UNITED STATES CODE, TITLE 29:

§160(b) Complaint and notice of hearing; answer; court rules of evidence applicable.

....PROVIDED, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge.

UNITED STATES CODE, TITLE 29:

§185(a) Suit by and against labor organizations, venue, amount, and citizenship.

(a) Suit for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court

of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

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STATEMENT OF THE CASE

Plaintiffs are thirteen employees of McLean Trucking Company who brought an action in the Federal District Court in Connecticut under the jurisdiction of §301 of the Labor Management Relations Act (29 U.S.C. §185) for breach of a collective bargaining contract between McLean and the defendant Teamsters Union Locals 191 and 677, and breach of the duty of fair representation by the Locals.

The within action was initially filed on June 13, 1980, and amended complaints were filed on September 3, 1980 and September 2, 1981.

Plaintiffs contend that as former employees of ONC Trucking Company, they were entitled to be dovetailed in seniority with McLean employees when McLean purchased certain operations and assets of ONC Trucking Company, and that the defendants, in

breach of contract obligations and the duty of fair representation, entailed ONC employees rather than dovetailing them, with the result that ONC employees were given the lowest seniority and lost substantial wages and benefits thereby.

McLean filed a Motion to Dismiss on September 8, 1980, which was granted by Magistrate Arthur Latimer on June 2, 1981, based on this Court's opinion in United Parcel Service, Inc., v. Mitchell, 451 U.S. 56 (1981). The Magistrate's opinion was approved and adopted by the District Court (Burns, J.) on August 25, 1981. The Court granted leave to file an amended complaint and McLean moved to dismiss the Second Amended Complaint on grounds of the statute of limitations of 9 U.S.C. §12 and/or §52-420 of the Connecticut General Statutes. On June 8, 1983, the DelCostello case was issued. By motion of July 5, 1983 McLean sought to dismiss based on DelCostello. On July 12,

1983, the union first filed a Motion to Dismiss based on DelCostello.

On February 8, 1984 Magistrate Latimer granted all defendants' Motions to Dismiss based on DelCostello, and on May 24, 1984 Judgment was entered for defendants.

Plaintiffs appealed from the Judgment of the District Court contending that DelCostello should not have been applied retroactively to this case and that filing of unfair labor charges before the National Labor Relations Board should have tolled the six-month statute under 29 U.S.C. §160.

The Second Circuit filed an informal opinion on December 14, 1984 affirming the District Court and holding that "the six-month Statute of Limitations set forth in DelCostello applies retroactively to all 'claims under Section 301.'"

REASONS FOR GRANTING THE WRIT

I.

The Court of Appeals found without merit the argument that the application of a shortened statute of limitations to bar a claim which was timely under prior law raised significant constitutional issues under the Fifth Amendment of the United States Constitution. When this action was filed on June 13, 1980, the decision in Abrams v. Carrier Corp. 434 F.2d 1234, 1253 (2nd Cir. 1970) represented clear authority in the Second Circuit that the applicable statute of limitations period for §301 hybrid actions was the period for an action upon a contractual obligation or liability, that the same statute governed both the action against the employer and the labor representative.

The United States Supreme Court has often cast doubt on the constitutionality

of legislation shortening statutes of limitations without giving reasonable opportunity for litigants to press existing or pending claims. In the often-cited decision of Sohn v. Waterson 17 Wall 596 (84 U.S. 1873) Justice Bradley stated at p. 599:

> "A statute of limitations may undoubtedly have effect upon actions which have already accrued as well as upon actions which accrue after its passage. Whether it does so or not will depend upon the language of the act, and the apparent intent of the legislature to be gathered therefrom. When a statute declares generally that no action, or no action of a certain class shall be brought, except within a certain limited time after it shall have accrued, the language of the statute would make it apply to past actions as well as to those arising in the future. But if an action accrued more than the limited time before the statute was passed a literal interpretation of the statute would have the effect of absolutely barring such action at once. It will be presumed that such was not the intent of the legislature. Such an intent would be unconstitutional. To avoid such a result, and to give the statute a construction that will enable it to stand, courts have given it a

prospective operation. In doing this, three different modes have been adopted by different courts. One is to make the statute apply only to causes of action arising after its passage. But as this construction leaves all actions existing at the passage of the act, without any limitation at all (which, it is presumed, could not have been intended), another rule adopted is, to construe the statute as applying to such existing actions only as have already run out a portion of the statutory time, but which still have a reasonable time left for prosecution before the statutory time expires -- which reasonable time is to be estimated by the court -- leaving all other actions accruing prior to the Statute unaffected by it. The latter rule does not seem to be founded on any better principle than the former. It still leaves a large class of actions entirely unprovided with any limitation whatever, or, as to them, is unconstitutional, as is a more arbitrary rule than the first. A third construction is that which was adopted by the Court below in this case, and which we regard as much more sound than either of the others (citing C.J. Taney, in Lewis v. Lewis, 7 Harvard 778). 'Upon principle, it would seem to be clear, that it must commence when the cause of action is first subjected to the operation of the statute, unless the legislature

has otherwise provided.'"

In a decision upholding a state reduction of the limitations period for suits by municipal bond holders, Koshkonong v. Burton 104 U.S. 668 (1881) at 675, the opinion states:

> "It was undoubtedly within the constitutional power of the legislature to require, as to existing causes of action, that suits for their enforcement should be barred unless brought within a period less than that prescribed at the time the contract was made or the liability incurred from which the cause of action arose. The exertion of this power is, of course, subject to the fundamental condition that a reasonable time, taking all the circumstances into consideration be given by the new law for the commencement of an action before the bar takes effect."

Sohn v. Waterson, supra, was cited with approval by the Supreme Court as late as 1953 in United States v. Lindsey, 346 U.S. 568, 570.

The difficulty herein is that the triple barrage of United Parcel Service,

Inc. v. Mitchell, 451 U.S. 56 (April 20, 1981); DelCostello v. International Brotherhood of Teamsters, 462 U.S. 101, 103 S.Ct. 2281, 76 L.Ed.2d. 476 (1983); and Welyczko v. U.S. Air, Inc. 733 F.2d 239 (2nd Cir, 1984) left plaintiffs no time whatsoever, let alone a reasonable time since pending actions were summarily dismissed.

If it be argued that the Sohn case and its progeny protect only against State infringements under the obligation of contract clause of the U.S. Constitution, other cases extend the principle to the federal leval within the ambit of the Due Process clause of the Fifth Amendment. See Lynch v. United States, 292 U.S. 571, 580 (1933):

> "Contracts between individuals or corporations are impaired within the meaning of the constitution whenever the right to enforce them by legal process is taken away or materially lessened."

In a case upholding a federal statute shortening the time required for application for citizenship to seven years after declaration, the Supreme Court stated in United States v. Morena, 245 U.S. 392 at 397 (1917):

> "A limitation of time even upon the assertion of a right therefore having no limitation upon its assertion, or a different limitation, is not infrequent, and its legality is unquestionable if a time reasonable, in view of the subject matter, be given."

An extensive discussion of the Sohn decision is contained in Union Pacific RR v. Laramie Stockyards, 231 U.S. 200 (1913). The Supreme Court in Herrick v. Boquilles Cattle Co, 200 U.S. 96, 102 (1905) noted that a suit pending at the time a ten-year statute took effect could not be barred by retrospective application of the statute, citing Vreeland v. Town of Bergen, 34 N.J. Law 438. See also W.E. Wortham Co.

v. Thomas, 292 U.S. 426, 433 (1934) per J. Hughes:

> "But we also held that this essential reserved power of the State must be constured in harmony with the fair intent of the constitutional limitation, and that this principle precluded a construction which would permit the state to adopt as its policy the repatriation of debts or the destruction or the denial of the means to enforce them."

In Terry v. Anderson, 95 U.S. 628, 632 (1877), Chief Justice Waite wrote:

> "This court has often decided that statutes of limitations affecting existing rights are not unconstitutional if a reasonable time is given for the enforcement of the action before bar takes effect."

In Canadian Northern Reg. Co. v. Eggen, 252 U.S. 547, 562 (1920) the Supreme Court opinion stated:

> "This is the principle on which this court has repeatedly ruled that contracts were not impaired in a constitutional sense by change in limitations statutes which reduce the time for commencing actions upon them, provided a reasonable time was

> given for commencing suit before the new bar took effect. Sohn v. Waterson, 17 Wall 596, Terry v. Anderson 95 U.S. 628, 632, Tennessee v. Sneed, 96 U.S. 69, 74, Antoni v. Greenhow 107 U.S. 769, 774."

Judge Robert Zampano of the Federal District Court for the District of Connecticut dealt with this principle in Ferguson v. Sturm Ruger & Co., Inc. 524 F.Supp 1042, 1045 (1981) interpreting a Connecticut Statute stating:

> "To the extent an act amends a statute of limitations so as to bar accrued causes of action which were not barred by the previous statute it is unconstitutional, Sohn v. Waterson, 84 U.S. (17 Wall) 596, 599 ....The provision here in question did not allow for any 'grace period' which could save it from the proscription of this doctrine."

If Congress were to enact a six-month statute of limitations for §301 actions and to bar pending actions previorsly governed by applicable state statutes of limitations, could such action

pass constitutional muster under the foregoing authorities? It seems likely that this court would imply a grace period in order to prevent the statute from operating retrospectively to bar pending claims. The federal courts have been left to administer an area of law through action which resembles the legislative function. Congress never placed a limitation on §301 actions, but the performance of that function resembles a legislative act.

Whether the imposition of a limitations period to §301 actions be viewed as a legislative or a judicial function, can the constitutional problem dealt with so carefully by this Court be dealt with differently because the courts, rather than Congress, are left to fashion the applicable law?

II

There is a conflict in the circuits. Although most circuits, including the Second Circuit, apply DelCostello retroactively,

the 9th Circuit does not. Edwards v. Teamsters Local 36, 719 F.2d 1036, 1040-1041 (9th Cir, 1983), cert. denied ___ U.S. ____ 104 S.Ct. 1599, 80 L.Ed.2d. 130 (1984) Barina v. Gulf Trading and Transportation Co., 726 F.2d 560, 562-63 (9th Cir., 1984); Scoggins v. Boeing Co., Inc. 742 F.2d 1255 (9th Cir, 1984).

Additionally, the Second Circuit held in Welyczko v. U.S. Air, Inc., 733 F.2d 239 (2nd Cir. 1984) that DelCostello did not require the application of Chevron Oil Co., v. Huson. The Sixth Circuit held to the contrary in Pitts v. Frito-Lay, Inc. 700 F.2d 330 (6th Cir, 1983).

The First Circuit applied the Chevron tests adversely to the plaintiff but noted that the cause of action accrued in November of 1982. DelCostello was decided June 9, 1983 and suit was brought thereafter on July 15, 1983. Graves v. Smith's Transfer Corp., 736 F.2d 819 (1st Cir, 1984).

The Third Circuit applied the Chevron tests adversely to plaintiff, noting that the action had been brought on September 18, 1981 after the decision in United Parcel Service v. Mitchell on April 20, 1981 and noting also that there was no clear precedent that the plaintiff could rely on. Perez v. Dana Corporation, Parash Frame Div. 718 F.2d 581, 587-588 (3rd Cir, 1983).

The Fourth Circuit in Murray v. Branch Motor Express Company, 723 F.2d 1146, contained no discussion of past precedent in the circuit, referred to a chaotic development of law in the area, and applied Chevron adversely to a plaintiff who sued on September 13, 1978, some 29 months after accrual of the cause of action. However, the Federal District Court opinion in DelCostello v. International Brotherhood of Teamsters, 524 F.Supp. 721 aff'd. 679 F.2d 279 applied the Chevron tests adversely to plaintiffs in applying

United Parcel Service, Inc., v. Mitchell retroactively. The District Court described the unpublished decision of Kennedy v. Wheeling Pittsburgh Steel Corp., 81 LRRM 2349 (4th Cir. 1973) as not "addressing the question decided in Mitchell", since Kennedy did not deal with arbitration.

The Fifth Circuit appears to be consistent with the Second Circuit in applying DelCostello retroactively to all hybrid cases regardless of a Chevron Oil analysis. Edwards v. Sea Land Service, Inc. 720 F.2d 857 (5th Cir. 1983), Gray v. Meatcutters, ___ F.2d ___, 116 LRRM, 3173, 3174 (5th Cir, 1984).

The Seventh Circuit applied DelCostello retroactively to a suit begun April 9, 1982, the cause of action having occurred May 13, 1981. Ernst v. Indiana Bell Telephone Co., 717 F.2d 1036 (7th Cir. 1983). It would appear that the 7th Circuit joins the "all cases" approach of the Second

and Fifth Circuits. The Eighth Circuit applied Chevron adversely to a plaintiff who sued June 8, 1982, noting since United Parcel Serv. Service, Inc. v. Mitchell presaged DelCostello, thus there was no clear break with past precedent. Lincoln v. District 9 of I.A.M. 723 F.2d 627, 630 (8th Cir, 1983). See also Aarsvold v. Greyhound Lines, Inc. 724 F.2d 72 (8th Cir, 1983).

The Eleventh Circuit applied DelCostello retroactively without discussing Chevron, Rogers v. Lockheed - Georgia Co., 720 F.2d 1247, 1249 (11th Cir, 1983).

If Chevron is to stand it amounts to quite a strain to find that the case does not apply to these facts. In Chevron, while the plaintiff's case was pending, the Supreme Court decided Rodrigue v. Aetna Casualty & Surety, 395 U.S. 352, which held that the statute of limitations applicable to an action for injuries under the Lands Act was

the shorter state statute, rather than the longer federal period relied on by plaintiff. The oft-cited three factors of Chevron militate in plaintiff's favor herein. First either Mitchell or DelCostello or the two cases combined represented a clear break from the Abrams case in the Second Circuit.

Secondly, looking to purpose and effect, it is argued that if cases brought prior to United Parcel Service, Inc. v. Mitchell in timely reliance on clear precedent in their circuit are allowed to proceed, no damage will be done tothe rule of uniformity.

Third, as in the Chevron case "retroactive application of the (shorter) statute of limitations to this case would deprive the respondent of any remedy whatsoever or the basis of superceding legal doctrine that was quite unforseeable." 404 U.S. at 96.

As stated by the Chevron Court "non

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retroactive application here simply preserves his right to a day in Court." (404 U.S. p. 96).

III

Whether, as maintained by the Second Circuit in Welyczko, the Supreme Court in DelCostello intended to dispense with its tests under Chevron Oil Co. v. Huson for §301 hybrid action, raises an important question of federal law.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the Judgment and Opinion of the United States Court of Appeals for the Second Circuit.

Respectfully Submitted,

Ernest C. LaFollette, Esq.
Of Counsel,
Thomas Twist, Esq.
Counsel for Petitioner

March 12, 1985

A P P E N D I X

UNITED STATES COURT OF APPEALS
Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 14th day of December one thousand nine hundred and eighty four.

Present: HONORABLE IRVING R. KAUFMAN,

HONORABLE WILLIAM H. TIMBERS,

HONORABLE MAX ROSENN,*

Circuit Judges.

HAROLD A. BEDAT, JOHN BENEVENTO, MICHAEL VARGA, RICHARD NOEL, WILLIAM P. DENSMORE, CHESTER BARTNIKOVSKI, WILLIAM BURNETT, THOMAS H. BYRON, ROBERT FLORA, ROBERT STEFURAK, PETER MOISAN, JOHN MIKLUS, and ANTHONY ESPOSITO,

Plaintiffs-Appellants,

-against-

McLEAN TRUCKING COMPANY, LOCAL 191-INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA and LOCAL 677- INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Defendants-Appellees.

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* Senior Circuit Judge, U.S. Court of Appeals for the Third Circuit, sitting by designation.

Docket Number: 84-7507

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

Appeal from the United States District Court for the District of Connecticut.

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

1. Bedat, et al (Bedat) asserts that the district court improperly dismissed his complaint as time barred. In DelCostello v. International Brotherhood of Teamsters, 462 U.S. 101 (1983), the Supreme Court established a six-month statute of limita-

tions for claims brought pursuant to Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (a). The "federal policies at stake and the practicalities of litigation" demanded such a uniform federal limitations standard. Id. The six-month statute of limitations set forth in DelCostello applies retroactively to all "claims under Section 301." Welyczko v. U.S. Air, Inc., 733 F.2d 239, 241 (2d Cir. 1984); see also Assad v. Mt. Sinai Hospital, 725 F.2d 837 (2nd Cir. 1984); Edwards v. Sea Land Service, Inc., 720 F.2d 857 (5th Cir. 1983). Because Bedat's complaint was filed eight months after the New England Joint Area Conference Committee determined that Bedat was "not entitled to dovetail seniority rights," the district court's dismissal was proper under DelCostello. See Welyzcko, supra, 733 F.2d at 241.

2. Bedat claims that, in any event, his complaint was filed within the

six-month statute of limitations mandated by DelCostello. He urges that the statute should have been tolled when he filed and pursued charges with the National Labor Relations Board (NLRB). Where the same factual circumstances give rise to two separate and independent avenues of relief, the pursuit of one statutory remedy will not toll the statute of limitations for the for the other cause of action. See International Union of Electrical, Radio and Machine Workers v. Robbins & Myers, Inc., 429 U.S. 229 (1976); Johnson v. Railway Express Agency, 421 U.S. 454 (1975). Actions brought pursuant to Section 301 are wholly distinct from claims filed with the NLRB. See Vaca v. Sipes, 386 U.S. 171, 182-82 n.8 (1967). Accordingly, the filing of unfair labor practice charges with the NLRB will not toll the running of the statute of limitations on a Section 301 claim. See Aarsvold v. Greyhound Lines, Inc., 724 F.2d 72 (8th Cir.

1983); Nicely v. United States Steel Corp. 574 F.Supp. 184, 187-88 (W.D. Pa. 1983). Moreover, even if it were assumed that DelCostello's six-month statute of limitations was tolled during the pendency of the NLRB action, Bedat's filing of this Section 301 suit on June 13, 1980 was still untimely.

3. Bedat's other claims are similarly without merit.

4. Accordingly, the judgment of the district court is affirmed.

/s/ Irving R. Kaufman
IRVING R. KAUFMAN

/s/ William H. Timbers
WILLIAM H. TIMBERS,

/s/ Max Rosenn
MAX ROSENN,
Circuit Judges